Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07309/2019

THE IMMIGRATION ACTS

Heard at: Manchester CJC (Skype)	**Decision & Reasons Promulgated**
On the: 13th October 2020	**On the: 23rd March 2021**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Mr Prithivi Khand
(no order for anonymity)

Appellant

And

Entry Clearance Officer
(Sheffield Hub)

Respondent

For the Appellants: Mr Wilding of Counsel instructed by Makka Solicitors Ltd
For the Respondent: Mr McVeety, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Nepal born on the 28th December 1988. He seeks entry clearance to the United Kingdom on human rights grounds; specifically he wishes to join his mother Mrs Lila Devi Khan, the widow of a former Gurkha soldier now settled in the United Kingdom. The application for entry clearance was refused in a decision dated the 28th March 2019.

2. The Appellant's appeal against that decision came before the First-tier Tribunal (Judge Seelhoff) on the 31st January 2020. By his decision promulgated on the 7th February 2020 Judge Seelhoff dismissed the appeal on human rights grounds. He concluded that the Appellant could meet the requirements of Annex K of the Immigration Rules. Insofar as the Appellant relied on Article 8 'outside of the rules' Judge Seelhoff did not consider that a family life existed nor accordingly that the decision to refuse entry clearance was disproportionate.

3. The Appellant sought permission to appeal to the Upper Tribunal. Permission was granted by the First-tier Tribunal (Judge Neville) on the 28th April 2020.

The First-tier Tribunal Decision

4. That the Appellant could not meet any requirement of the Immigration Rules was not in issue. It was plainly accepted that he could not, since those rules do not provide for entry as the adult child of a Gurkha widow. That, properly, was the starting point for the First-tier Tribunal's enquiry.

5. The Tribunal proceeded to consider Article 8 'outside of the rules'. The first matter was to consider whether Article 8 was engaged. Applying R (on the application of Razgar) v Secretary of State for the Home Department [2004] UKHL 27 that involved making a finding as to whether the Appellant, by then a 31 year-old man, shared a family life with his widowed mother. The Tribunal directed itself [at §8] that there is "extensive case law on Gurkha cases", indicating that it was familiar with that jurisprudence and that it would have particular regard to Annex K of the Immigration Rules and the decisions in Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31 and Jitendra Rai v Entry Clearance Officer (New Delhi) EWCA Civ 320 [2017].

6. Its findings on the facts were as follows. The Tribunal was not satisfied that the Appellant's mother, referred to hereinafter as the sponsor, had come up to proof. She had been unable to answer many of the questions put to her by the Judge (the Respondent had not been present at the hearing) and was confused about her son's current circumstances. For that reason the Tribunal could not be satisfied that those circumstances are as they had been claimed to be in the application. The evidence indicated that the Appellant lives in a place called Butwal with his two brothers and one of this brother's wife and children. This is not the same place as his mother lived, or the village where she claims he now resides: Shankarnagar. The Appellant's brother Bijaye works and so it is far from clear whether the Gurkha army pension is the main source of income for the family. The Appellant himself has a degree and although his claim to have always been unemployed is supported by a certificate from the local committee in Shankarnagar, this is not based in Butwal, where he says that he lives: the Judge notes that this "discrepancy in the evidence does leave me with

questions". "Crucial" bank statements are missing, covering the period around the application. Having had regard to all of those matters, the Tribunal was not satisfied that there was a family life between the Appellant and his mother.

7. The Tribunal to proceeded to consider, in the alternative, whether the decision to refuse to grant entry clearance would be disproportionate if family life was established. It found there to be a distinction between this case and the vast majority of other Gurkha cases, where "the person being separated from their family is a Gurkha to whom the UK owes a debt". It went on:

> "The fact that widows are not entitled to sponsor their family members under the policy must be intended to reflect the fact that widows are a step removed from the historic injustice when compared to Gurkhas themselves. It is a conscious decision on the part of the Secretary of State to exclude Gurkha widows from being able to sponsor adult children. I consider that that must reflect a belief that the circumstances are fundamentally different. In my assessment it does not follow that the Appellant and his mother are in the context of this case prejudiced by the historic injustice as alleged".

Error of Law: Discussion and Findings

8. Of the four grounds advanced in the grounds (drafted by Mr Jesuram of Counsel) Mr McVeety was able to indicate that the Respondent did not oppose two.

9. The first uncontested ground relates to the adverse inference apparently drawn by the Tribunal from the discrepancy between the address given as 'Butwal' and also as 'Shankarnagar". As a matter of fact, I accept that Shankarnagar is a village close to the town of Butwal and that it is commonly known by that association, Butwal being the administrative and postal district. There is therefore no discrepancy at all in the descriptions of where the family home actually is. The error of law in the Tribunal assuming otherwise could be framed in any one of three ways, and each is made out:

   a) an error of fact leading to material unfairness;

   b) a failure to take material evidence into account, viz the explanation offered in a letter from Tilottama Municipality Office explaining that village addresses in Nepal have since a government decree in 2014 been subsumed by their municipality and so two different addresses can in fact relate to the same place;

c) unfairness in that the point was not taken by the Respondent – had the judge wishes to hear an explanation for the 'discrepancy' he should have alerted the Appellant (or on this occasion his representatives or Sponsor) to his concern and given an opportunity for them to respond.

10. The second ground accepted as made out by Mr McVeety for the Entry Clearance is this. There was absolutely no basis in law for the Judge's conclusion that none of the jurisprudence on the 'historic injustice' faced by Gurkha families was relevant to this family. The Appellant asserts that his Gurkha father would have settled in this country had he had the opportunity to do so upon his discharge from the British Army. Had he done so his wife would have accompanied him and his children would have been British, as they would have been born here to settled parents. That is the injustice that the courts, and Her Majesty's government, have sought to redress, and that is so whether or not his father is still alive. The First-tier Tribunal erred in finding otherwise.

11. I now turn to the grounds that remained in contention before me.

12. Mr Wilding submitted that in its assessment of whether a family life existed between mother and son for the purpose of Article 8 the Tribunal has erred in two interrelated respects. First it is apparent from the reasoning overall that the Tribunal has erred in focusing on whether the Appellant is *dependent* upon his mother: as the Court of Appeal made clear in Rai (*supra*) the question is not one of dependency, but rather whether one gives the other real, effective or committed *support*. The second error is in the Tribunal's focus on whether or not this is a dependency of *necessity*: that the Appellant *could* work, or *could* be supported by other means was not relevant if in fact he *is* supported by his mother.

13. The relevant jurisprudence is comprehensively reviewed in Rai:

> 17. In Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31, Sedley L.J. said (in paragraph 17 of his judgment) that "if dependency is read down as meaning "support", in the personal sense, and if one adds, echoing the Strasbourg jurisprudence, "real" or "committed" or "effective" to the word "support", then it represents … the irreducible minimum of what family life implies". Arden L.J. said (in paragraph 24 of her judgment) that the "relevant factors … include identifying who are the near relatives of the appellant, the nature of the links between them and the appellant, the age of the appellant, where and with whom he has resided in the past, and the forms of contact he has maintained with the other members of the family with whom he claims to have a family life". She acknowledged (at paragraph 25) that "there is no presumption of family life". Thus "a family life is not established between an adult child and his surviving parent or other siblings unless something more exists than normal emotional ties". She added that "[such] ties might exist if the appellant were dependent on his family or *vice versa*", but it was "not … essential that the members of the family should be in the same country". In Patel and others v Entry Clearance Officer, Mumbai [2010] EWCA Civ 17, Sedley L.J. said (in paragraph 14 of his judgment,

with which Longmore and Aikens L.JJ. agreed) that "what may constitute an extant family life falls well short of what constitutes dependency, and a good many adult children … may still have a family life with parents who are now settled here not by leave or by force of circumstance but by long-delayed right".

18. In Ghising (family life – adults – Gurkha policy) the Upper Tribunal accepted (in paragraph 56 of its determination) that the judgments in Kugathas had been "interpreted too restrictively in the past and ought to be read in the light of subsequent decisions of the domestic and Strasbourg courts", and (in paragraph 60) that "some of the [Strasbourg] Court's decisions indicate that family life between adult children and parents will readily be found, without evidence of exceptional dependence". It went on to say (in paragraph 61):

"61. Recently, the [European Court of Human Rights] has reviewed the case law, in [*AA v United Kingdom* [2012] Imm. A.R.1], finding that a significant factor will be whether or not the adult child has founded a family of his own. If he is still single and living with his parents, he is likely to enjoy family life with them. …".

The Upper Tribunal set out the relevant passage in the court's judgment in *AA v United Kingdom* (in paragraphs 46 to 49), which ended with this (in paragraph 49):

"49. An examination of the Court's case-law would tend to suggest that the applicant, a young adult of 24 years old, who resides with his mother and has not yet founded a family of his own, can be regarded as having "family life"."

19. Ultimately, as Lord Dyson M.R. emphasized when giving the judgment of the court in Gurung (at paragraph 45), "the question whether an individual enjoys family life is one of fact and depends on a careful consideration of all the relevant facts of the particular case". In some instances "an adult child (particularly if he does not have a partner or children of his own) may establish that he has a family life with his parents". As Lord Dyson M.R. said, "[it] all depends on the facts". The court expressly endorsed (at paragraph 46), as "useful" and as indicating "the correct approach to be adopted", the Upper Tribunal's review of the relevant jurisprudence in paragraphs 50 to 62 of its determination in Ghising (family life – adults – Gurkha policy), including its observation (at paragraph 62) that "[the] different outcomes in cases with superficially similar features emphasises to us that the issue under Article 8(1) is highly fact-sensitive".

20. To similar effect were these observations of Sir Stanley Burnton in Singh v Secretary of State for the Home Department [2015] EWCA Civ 630 (in paragraph 24 of his judgment):

"24. I do not think that the judgments to which I have referred lead to any difficulty in determining the correct approach to Article 8 in cases involving adult children. In the case of adults, in the context of immigration control, there is no legal or factual presumption as to the existence or absence of family life for the purposes of Article 8. I point out that the approach of the European Commission for Human Rights cited approvingly in *Kugathas* did not include any requirement of exceptionality. It all depends on the facts. The love and affection between an adult and his parents or siblings will not of itself justify a finding of a family life. There has to be something more. A young adult living with his parents or siblings will normally have a family life to be respected under Article 8. A child enjoying a family life with his parents does not suddenly cease to have a family life at midnight as he turns 18 years of age. On the other hand, a young adult living

> independently of his parents may well not have a family life for the purposes of Article 8."

14. From theses authorities the Court drew two conclusions relevant to the First-tier Tribunal's enquiry. First, that Kugathas has been restrictively read and in fact there exists no requirement of 'exceptionality' when considering the family life shared between adult children and their parents. Second, that the language of 'dependency' is unnecessary. What matters is whether the adult child derives real, committed or effective *support* from his parents. This could be in the form of financial, or emotional support. I therefore accept the submission that the Tribunal here erred in apparently misconstruing the meaning of Rai: although the authority is cited in the decision, it does not appear to have been applied.

15. The final point made on the Appellant's behalf is this. The decision of the First-tier Tribunal is largely focused on the claims of financial support. In fact that was not the totality of the case. The uncontested evidence was that the Appellant and Sponsor are very close and that they speak every day. A statement from a third party, Basanti Rana, set out how much mother misses son, how she cannot sleep because she is separated from her children and how Ms Rana has seen her cry when speaking with him. This was important evidence going to the bond between the two, and it does not feature at all in the First-tier Tribunal's reasoning. The error being a failure to consider material evidence, it is made out.

16. The Appellant having satisfied me that the decision contains four material errors I set it aside in its entirety. In view of the findings of fact that need to now be re-made I consider that the most appropriate forum for that would be in the First-tier Tribunal.

Decisions

17. The decision of the First-tier Tribunal is set aside for error of law.

18. The appeal is to be heard *de novo* in the First-tier Tribunal by a Judge other than Judge Seelhoff.

19. There is no anonymity order.

Upper Tribunal Judge Bruce
18th March 2021